1996

Curtis Chipman, Fay Chipman v. Janice Miller, Dana Anderson, and Kim Anderson : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

CURTIS CHIPMAN and FAY CHIPMAN, Plaintiffs-Appellees, vs. JANICE MILLER, DANA ANDERSON and KIM ANDERSON, Defendants-Appellants.	Case No. 960194-CA Oral Argument Priority 15

BRIEF OF APPELLEES

APPEAL FROM THE FINAL DECREE OF THE FOURTH JUDICIAL COURT OF UTAH COUNTY, THE HONORABLE GUY R. BURNINGHAM

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IN THE UTAH COURT OF APPEALS

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JURISDICTION

This is an appeal from a final decree in a civil action. Jurisdiction was conferred on the Utah Supreme Court by Utah Code Ann. § 78-2-2(3)(j) (Supp. 1996). This Court has pour-over jurisdiction under Utah Code Ann. § 78-2a-3(2)(k) (Supp. 1996).

ISSUES PRESENTED

1. Did the trial court err in awarding attorney fees to a party which prevailed in defeating the opposing claim for attorney fees, where the opposing claim for fees was barred by statute and controlling case law? The trial court's finding of bad faith must be affirmed unless clearly erroneous. Jeschke v. Willis, 811 P.2d 202, 204 (Utah Ct. App. 1991). The trial court's legal conclusions on the interpretation of the statute are reviewed for correctness. State v. Larsen, 865 P.2d 1355, 1357 (Utah 1993).

2. Where plaintiffs entitled to an award of attorney fees for prevailing in a quiet title action, where defendants did not contest the quiet title claim after the filing of the complaint? This is a legal issue which is reviewed for correctness. Id.

3. Are defendants entitled to double costs and attorney fees for responding to this appeal, where appellants' claims are barred by controlling cases and where appellants have persisted in their claims in bad faith? This is an original issue addressed to this Court.

DETERMINATIVE STATUTES AND RULES

Utah R. Civ. P. 11:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name who is duly licensed to practice in the state of Utah. The attorney's address also shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certification by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the

> cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

STATEMENT OF THE CASE

A. Nature Of The Case. This is an appeal from a final judgment in a civil action. Plaintiffs' complaint sought to quiet title to real property and judgment for attorney fees. Defendants counterclaimed for attorney fees.

B. Course Of Proceedings And Disposition Below.

The statement of facts below contains a more detailed procedural history. This section present only a general overview.

Plaintiffs filed their complaint March 8, 1995. (R. 6-1.[1]) Defendants answered and counterclaimed on April 18, 1995. (R. 16-11, 21-17.) The defendants' answers consented to Count I of plaintiffs' complaint, denied the allegations supporting Count II, and counterclaimed for attorney fees pursuant to Rule 11 and Utah Code Ann. § 78-27-56 (1988). On May 1, 1995, plaintiffs filed a

[1]The papers in the trial court file are organized in reverse chronological order, with the result that the record index numbers for any particular document run in reverse order.

"Cross Motion for Attorney's Fees." (R. 27.) Both parties submitted briefs and affidavits on the attorney fee issues.

On May 25, 1995, plaintiffs requested that the trial court rule on the pending motions. On July 21, 1995, the trial court entered a ruling denying plaintiffs' request for attorney fees and awarding attorney fees to defendants in the amount of $484.00. (R. 129-128.)

On September 51, 1995, plaintiffs objected to a proposed form of judgment submitted by defendants (R. 138-134) and requested a hearing "to verify the basis of the court's decision." (R. 140.) The trial court held the requested hearing on October 5, 1995, and affirmed and explained the prior ruling. (R. 142-141.) Findings of Fact and Conclusions of Law (R. 146-143) and an Order and Judgment (R. 149-147) were entered November 16, 1995.[2] Plaintiffs filed their Notice of Appeal on December 12, 1995. (R. 160-159.)

C. Statement Of Facts.

Plaintiffs present a long and disparaging statement of plaintiffs' version of the facts preceding this lawsuit. As explained in Point I.B. below, Utah cases establish that the facts prior to the lawsuit are irrelevant. In addition, several of the statements are supported only by citation to plaintiffs' legal

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[2]On the same day plaintiffs filed an objection to the form of the findings and order. (R. 153-150.) Plaintiffs withdrew that objection on January 10, 1996, in order to avoid any claim that the findings and order were not final. (R. 177.)

memoranda below, not by citation to any admissible evidence.[3] Defendants therefore object to but will not otherwise respond to the claims in plaintiffs' brief relating to the period prior to the lawsuit.

Plaintiffs filed their complaint March 8, 1995, seeking to quiet title to certain property under the doctrine of boundary by acquiescence, and further seeking an award of attorney fees. (Complaint, copy attached.) The prayer requested an award of attorney fees under a two-pronged theory. First, plaintiffs claimed that any defense to the action would be without merit and that plaintiffs would be entitled to their attorney fees in that event pursuant to Utah Code Ann. § 78-27-56(1) (1988). Second, plaintiffs alleged that if they prevailed in the action, then they would be entitled to their reasonable attorney fees incurred in prosecuting the action. The complaint asserted no legal argument to justify the claim for a prevailing-party award of fees.

In response to the complaint, defendants, through their attorney, tendered a quit claim deed from Janice Miller and a disclaimer of interest from the Andersons regarding the subject property. (R. 25-24.) Janice Miller had record title to the subject property; Andersons had never held nor claimed any interest in the subject property. (See R. 26-25; R. 89.) Plaintiffs

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[3] *E.g.*, the top lines on page 7 cite to R. 71, and the top paragraph on page 9 cites to R. 69. These pages of the record are part of a memorandum filed by plaintiffs, but are not supported by affidavit or other admissible evidence.

refused to accept the quit claim deed and disclaimer unless defendants also paid plaintiffs' pre-complaint attorney fees. (R. 24.) Defendants refused (id.), and defendants answered and counterclaimed for Rule 11 sanctions.[4] (R. 16-11, 21-17.)

After extensive briefing and additional affidavits from both parties, the matter was submitted to the court for decision and the court issued a ruling denying the plaintiffs' request for attorney fees and awarding defendants $484.00 in attorney fees. (R. 129-128.) Defendants had requested attorney fees of $921.50, which included all the fees incurred by defendants subsequent to the filing of the complaint. (R. 124-123.) The court disallowed defendants' fees incurred in answering the complaint and awarded only the fees incurred in responding to plaintiffs' requests for attorney fees. (R. 145, 165.) The attorney fees thus awarded included only the following:

Date	Description	hours	fee
5/04/95	Memorandum: opposition to motion (clerk)	5.50	$165.00
5/05/95	Review pleadings; proof brief	.75	93.75

[4]Plaintiffs criticize defendants for filing their answers and counterclaims on April 18, 1995, and claim plaintiffs had granted an extension until April 21 in order to allow plaintiffs to consider whether to pursue their claim for attorney fees. The affidavit of Craig M. Snyder filed with the answers and counterclaims disputes plaintiffs' claim, and asserts that plaintiffs' counsel stated, on April 18, that plaintiffs intended to pursue their claim for attorney fees. (R. 24.) Even if plaintiffs' version of the facts were correct, defendants are not aware of any requirement that they wait until the last possible moment to file an answer.

5/05/95	Memorandum: opposition to motion (clerk)	2.30	69.00
5/08/95	Pleadings - reply to motion	1.25	156.25
	Total	9.80	$484.00

(R. 124-123.) Plaintiff appealed from the $484.00 award. (R. 160-159.)

SUMMARY OF ARGUMENT

Plaintiffs prevailed on their quiet title claims, but were not entitled to an award of attorney fees. Two prior Utah Supreme Court decisions establish there is no cause of action for wrongful refusal to disclaim an interest in property.

Defendants prevailed in defending the plaintiffs' claim for attorney fees, and were properly awarded their attorney fees incurred in the defense. Plaintiffs' claim for attorney fees lacked merit, and plaintiffs persisted in the claim in bad faith.

Defendants should be awarded their fees incurred in responding to this appeal. The relief sought is barred by two prior Utah Supreme Court decisions, and plaintiffs do not seek to have those decisions overruled or modified. The appeal is made in bad faith.

ARGUMENT

POINT I

DEFENDANTS WERE THE PREVAILING PARTIES ON THE ATTORNEY FEE ISSUES, AND THE AWARD OF FEES IS SUPPORTED BY THE EVIDENCE.

A. Defendants were the prevailing party on the attorney fee issue.

The trial court awarded attorney fees to defendants based on Utah Code Ann. § 78-27-56 (1992), which authorizes an award of fees to a prevailing party if the offending claim both lacks merit and was made in bad faith. Cady v. Johnson, 671 P.2d 141, 151 (Utah 1983).

Section I of plaintiffs' brief argues that plaintiffs, not defendants, were the prevailing parties, and that Utah Code Ann. § 78-27-56 doesn't apply. This is true as to Count I, but not as to Count II of plaintiffs' complaint. The First Cause of Action alleged that title should be quieted in plaintiffs. The Second Cause of Action alleged that plaintiffs should be awarded attorney fees, including attorney fees incurred prior to the filing of the complaint. Plaintiffs obtained the relief sought on the first cause of action, but defendants were the prevailing party on the second cause of action.

Plaintiffs cite Highland Construction Co. v. Stevenson, 636 P.2d 1034 (Utah 1981), to support their argument that they were the prevailing party below. Highland involved a situation where the defendant initially denied liability and then, 163 days into the

action, voluntarily paid a portion of disputed claim. The case is not relevant to this quiet title case where defendants never contested plaintiffs' First Cause of Action. Based on Utah Code Ann. § 78-40-3 (1992), which prohibits an award of costs under these circumstances, it is evident that the legislature intended that a non-disputing party in a quiet title action be treated differently than a prevailing party in non-quiet-title contested civil action.

Although Highland does not help plaintiffs' prevailing party argument, the case does illustrates that there can be two prevailing parties in a lawsuit. Highland was an excavating subcontractor and performed work on a road project for Stevenson, the general contractor. Highland claimed that it was entitled to additional compensation by reason of particular adverse soil conditions and certain acts of Stevenson and sued to recover that additional compensation. Highland also sought recovery of certain amounts that were unpaid under the original contract. Stevenson counterclaimed to recover extra amounts that Stevenson had to pay to complete the work after Highland pulled off the job. Only 164 days after the lawsuit was filed, Stevenson voluntarily paid Highland $10,300.78 of the amount Highland was claiming. The case proceeded to trial and resulted in a finding that Highland had breached its contract and that Stevenson was entitled to recovery on its counterclaim. The trial court awarded attorney fees to Stevenson, but none to Highland. The Utah Supreme Court affirmed

most of the trial court's judgment but remanded for an award of attorney fees in favor of Highland, holding that it was the prevailing party on one issue, even though Stevenson prevailed on its counterclaim. 636 P.2d at 1038.

Similarly, in the instant case it was proper for the trial court to hold that defendants were the prevailing party on the second cause of action, even though plaintiffs obtained the relief sought on the first cause of action.

B. Plaintiffs' Claim For Attorney Fees Was Without Merit.

The gravamen of plaintiffs' appeal is a claim that Janice Miller had an obligation to assist plaintiffs in their efforts to quiet title to their property, and that she can be held liable for failing to execute a quit claim deed. This contention has no merit and has been rejected by the Utah Supreme Court on at least two occasions. In Draper v. J. B. & R. B. Walker, Inc., 115 Utah 368, 204 P.2d 826 (1949), the defendant had lawfully recorded a mortgage against plaintiff's property, based on a claimed tax title held by the mortgagor. The mortgagor's tax title was later held invalid, which also had the effect of invalidating the mortgage. Because the mortgage still appeared of record, however, it clouded title and prevented plaintiff from obtaining a loan which he badly needed. Plaintiff expended substantial time and money attempting to persuade defendant to release of record the obviously invalid mortgage, but defendant refused to do so. Plaintiff then sued, and the trial court awarded damages. The Utah Supreme Court reversed,

relying on a common law rule that a person has no duty to affirmatively disclaim an invalid interest:

> If, however, there is no duty to affirmatively act, but only to disclaim in event of suit, then no recovery may be had regardless of the unreasonableness of the refusal. At the common law, no action for damages would lie because of a refusal to release a mortgage or discharge a lien or claim against property.

204 P.2d at 829 (citations omitted).

This rule was more recently reaffirmed by the Utah Supreme Court in Jack B. Parson Companies v. Nield, 751 P.2d 1131 (Utah 1988). Nield had a recorded interest against property, but the interest was worthless because it was junior to a prior mortgage and the value of the property was apparently less than the amount of the prior mortgage. Nield refused to release his interest of record until after he was sued. The trial court awarded damages for his failure to clear title to the property, but the Utah Supreme Court reversed. The Court stated:

> There is no basis in law for this award. Quiet title actions are statutory in nature, *Holland v. Wilson*, 8 Utah 2d 11, 327 P.2d 250 (1958), and Utah Code Ann. §§ 78-40-1 through -13 (1987), authorizing quiet title actions, does not include any remedies for refusing to release title.

751 P.2d at 1133.

The trial court did not rely on these cases, but instead relied on the prohibition of an award of costs in Utah Code Ann. § 78-40-3 (1992). Plaintiffs claim error, and argue that attorney fees are not costs. Plaintiffs apparently argue that attorney fees

could be awarded even though the statute prohibits an award of costs. Plaintiffs have not cited any case which would support that proposition and defendants are not aware of any support for such a claim. This Court has previously recognized that "[a]ttorney fees are more properly considered costs" as opposed to damages. Amica Mutual Ins. Co. v. Schettler, 768 P.2d 950, 967 (Utah Ct. App. 1989). Logic decrees that if the statute prohibits even an award of costs, an award of attorney fees would likewise be unavailable. The trial court was correct in relying on the statute.

More importantly, even if the trial court's specific rationale was not proper, the trial court's denial of attorney fees should still be affirmed if there is another appropriate justification for the denial. Jensen v. Bowcut, 892 P.2d 1053, 1058 (Utah Ct. App. 1995) (trial court's stated ground for award of attorney fees was improper, but award was affirmed because alternative grounds existed). Nield and Draper provide ample alternative authority for the denial of attorney fees, and confirm that plaintiffs' complaint and motion for attorney fees were without merit.

C. There Is Adequate Evidence Of Bad Faith; Any Lack Of Sufficient Evidence Is Harmless.

The trial court's stated ground for the award of attorney fees is Utah Code Ann. § 78-27-56 (1992). An award of attorney fees under that statute requires proof that the offending claim both lacked merit and was made in bad faith. Cady v. Johnson, 671 P.2d 141, 151 (Utah 1983). Plaintiffs challenge the trial court's

finding that their second cause of action, which sought an award of attorney fees, was made in bad faith. The trial court's finding in this respect must be affirmed unless clearly erroneous. Jeschke v. Willis, 811 P.2d 202, 204 (Utah Ct. App. 1991).

In Cady, the Utah Supreme Court vacated an award of attorney fees where the offending claim was clearly without merit, but the only evidence of bad faith was the party's failure to research the issue as instructed by the trial court. The trial court concluded that adequate research would have disclosed that the claim was without merit. 671 P.2d at 152. The Utah Supreme Court held this alone was not sufficient evidence of bad faith. Id. The Court also approvingly cited a prior case which held that bad faith could be shown by evidence of "self-induced myopia." Id. (citation omitted).

Application of the bad faith elements articulated in Cady is illustrated in Baldwin v. Burton, 850 P.2d 1188 (Utah 1993), which found bad faith in the wrongful pursuit of a foreclosure sale against real property. Burton had obtained a judgment against Mr. Wood just after Mr. Wood had conveyed title to the property to Mrs. Wood. Mrs. Wood was Baldwin's predecessor in interest. Even though a subsequent title report showed that the judgment lien had attached to the property, and even though the literal language of the fraudulent conveyance statute gave some support to Burton's argument that the Mr. Wood to Mrs. Wood conveyance was void, the

Utah Supreme Court affirmed the finding that the foreclosure attempt was made in bad faith. 850 P.2d at 1199.

The evidence of bad faith in the instant case is equally as strong as in Baldwin. Defendants' attorney, Craig M. Snyder, testified in his affidavit that he had explained to plaintiffs' counsel that plaintiffs' claim for attorney fees was without merit because defendant Miller had disclaimed any interest in the property and had signed a quit claim deed as requested by plaintiffs' counsel. (R. 26-23.) Mr. Snyder also explained to plaintiffs' counsel that defendants Anderson had never claimed an interest in the subject property. Plaintiffs nevertheless persisted in pursuing a claim for attorney fees which they had been told, and should have known, was groundless. The trial court also noted the excessive amount of fees claimed.

Evidence of bad faith may also be found in subsequent events, based on the logic of the cases cited by plaintiffs which permit looking at pre-complaint events to determine if post-complaint actions were in bad faith. On June 16, 1995, more than a month before the trial court's ruling, defendants disclosed the Draper case to the court and to plaintiffs. Plaintiffs nonetheless continued to persist in their unfounded quest for attorney fees, including by filing several objections to the court's order. Additional evidence of bad faith is found in the fact that plaintiffs have failed, in their filings with this Court, to acknowledge the existence of Nield and Draper, both of which are

controlling adverse decisions. Utah R. Prof. Con. 3.3(a)(3). The trial court properly found that plaintiffs had pursued their request for attorney fees in bad faith.

Even if there is insufficient evidence of bad faith, however, the award of attorney fees should still be affirmed. Defendants' counterclaims advanced two alternative bases for an award of attorney fees: Utah Code Ann. § 78-27-56, and Utah R. Civ. P. 11. Rule 11 does not require a lack of bad faith, only a lack of reasonable inquiry. Barnard v. Sutliff, 846 P.2d 1229, 1236 (Utah 1992). For the reasons stated elsewhere in this brief, defendants submit that the plaintiffs could not have made a reasonable inquiry. Although perfect research is not required, id., in none of the cases cited by plaintiffs was there an award of pre-complaint attorney fees. The language of the statute itself only authorizes an award of attorney fees incurred "in the action." Utah Code Ann. § 78-27-56. Review of the digest headnotes under "quieting title" or "libel and slander," both of which were relevant to plaintiffs' claim for damages resulting from defendants' failure to disclaim title, would have revealed both the Draper and the Nield cases, and at a minimum would have revealed the lack of any other case authorizing an award of pre-complaint attorney fees. Defendants therefore respectfully assert that plaintiffs could not have made a reasonable inquiry concerning their claimed right to pre-complaint attorney fees.

The apparent lack of inquiry in this case is similar to that discussed in Backstrom Family Limited Partnership v. Hall, 751 P.2d 1157 (Utah Ct. App. 1988), where the court awarded double coasts attorney fees on appeal because the attorney should have realized that the judgment was not final and appealable. The award of attorney fees in the instant case was appropriate and should be affirmed.

POINT II

PLAINTIFFS WERE NOT ENTITLED TO ATTORNEY FEES EVEN THOUGH THEY PREVAILED ON THEIR QUIET TITLE CLAIMS.

Section II of plaintiffs' brief argues that plaintiffs should have been awarded their attorney fees because plaintiffs prevailed in quieting title to their property, and because (according to plaintiffs) defendant Miller should have acquiesced in plaintiffs' earlier demands to sign a quit claim deed. This claim has no merit. Two Utah Supreme Court cases establish that there is no right of action in Utah for recovery of pre-complaint damages for failure to disclaim an interest in property. Jack B. Parson Companies v. Nield, 751 P.2d 1131, 1133 (Utah 1988); Draper v. J. B. & R. B. Walker, Inc., 115 Utah 368, 204 P.2d 826, 829 (1949).

Sound policy arguments support the result of these two cases. Under plaintiffs' proposed rule, an individual could repeatedly force his or her neighbors to sign quit claim deeds affirming that the neighbors claimed no interest in the individual's property. A more realistic example might be an individual, whose property was

regularly traversed by neighborhood children, requiring each of the neighbors to frequently formally disclaim any prescriptive easement. If the neighbor refused, the individual could hire an attorney to make persuasive and thoroughly researched arguments as to why the neighbor had no interest in the individual's property, and then expect payment for the attorney fees thus incurred.

Defendants acknowledge that there are circumstances where a neighbor perhaps should sign a quit claim deed. The Utah Legislature has, however, provided a speedy and effective remedy for any failure to disclaim: filing a quiet title action. Had the conduct of which plaintiffs now complain occurred after the filing of the complaint, plaintiffs might have had cause to seek attorney fees. Because defendants did not resist the quiet title claim in plaintiffs' complaint, however, no fees may be awarded.

The statute on which plaintiffs based their claim, Utah Code Ann. § 78-27-56(1), does not permit an award of fees in this situation. The statute states:

> In civil <u>actions</u>, the court shall award reasonable attorney's fees to a prevailing party if the court determines that the <u>action or defense to the action</u> was without merit and not brought or asserted in good faith . . . .

(Emphasis added.)

By its terms, this statute applies only to defenses to an action, i.e., a lawsuit. Defendants made no defense to the quiet title portion of plaintiffs' action. It follows that the defense was not made in bad in faith.

This Court need not decide whether there might be some situations other than this case where it might be appropriate to award attorney fees for work undertaken prior to filing the complaint. The Draper and Nield cases establish that such an award is not permissible under the facts of this case.

Section III of plaintiffs' brief claims that there is significant precedent and authority elsewhere for an award of pre-complaint attorney fees. Defendants submit that none of the cases cited by plaintiffs support plaintiffs' assertion. In none of the cases was an award of pre-complaint attorney fees actually made or affirmed. In addition, the only proposition that any of the cases might stand for is that pre-complaint actions might be admissible as evidence of bad faith and thereby support an award of post-complaint attorney fees, a proposition which is not at issue in this case.

For example, Hall v. Cole, 412 U.S. 1 (1973), contains no indication that any attorney fees were awarded for pre-complaint services. The case only holds that the evidence of bad faith may be drawn from actions both before and during the lawsuit. 412 U.S. at 15.

Plaintiffs cite Schlank v. Williams, 572 A.2d 101 (D.C. Ct. App. 1990) as supporting that a litigant might be entitled to pre-litigation attorney fees. The case never made such a statement, and the statement which plaintiffs apparently refer to was not a holding. What the case stated was: "We shall assume, without

deciding, that on a proper showing appellant would have been entitled to attorneys' fees for the pre-litigation conduct of RSA." 572 A.2d at 112 (emphasis added). That sentence was preceded by a discussion showing that there was a debate among the federal courts "over whether the bad faith exception applies to *pre*-litigation conduct." Id (italics in original). It is unclear from Schlank and the cases cited in it whether the debate is over pre-complaint evidence or pre-complaint attorney fees. What is clear, however, is that neither Schlank nor the cases cited in it made any award of pre-complaint attorney fees.

Plaintiffs further claim that "numerous other state courts have held that an award of attorney's fees is warranted by 'bad faith' or 'obduracy' during the pre-litigation time period." (Plaintiffs' brief at p. 26.) In support of this proposition, plaintiffs cite only two cases, both from New Hampshire. Neither case supports awarding pre-complaint attorney fees.

Harkeem v. Adams, 377 A.2d 617 (N.H. 1977), involved a claim that the New Hampshire Department of Employment Security had acted in bad faith in opposing the plaintiff's claim for unemployment benefits. The trial court found the state had acted in bad faith, awarded benefits of $1,104.00, and awarded attorney fees of one-third the amount of the recovery. Such an award of attorney fees for bad faith litigation had not been previously authorized in New Hampshire. In Harkeem, the New Hampshire Supreme Court adopted a rule authorizing such an award of attorney fees and affirmed the

trial court. Although some statements in the opinion might seem to support an award of attorney fees "where it should have been unnecessary for the successful party to have brought the action," 377 A.2d at 619 (citation omitted), the comments are dictum because the trial court awarded attorney fees based on a percentage of the recovery, without respect to when the fees were incurred. One may safely assume that the $368.00 in attorney fees did not even adequately cover the proceedings during the case itself.

Griffin v. New Hampshire Department of Employment Security, 370 A.2d 278 (N.H. 1977) expressly did not decide anything about attorney fees. 370 A.2d at 282. That issue was not decided until Harkeem.

In other words, plaintiffs have given no support for their claim that "significant precedent and authority" from other jurisdictions for an award of pre-litigation attorney fees. Plaintiffs have identified only one court which has stated, in dictum, that it might award such fees. Plaintiffs do not attempt to distinguish, nor even acknowledge the existence of, the two Utah Supreme Court cases that squarely hold that a cause of action for wrongful refusal to disclaim title is not recognized in Utah.

POINT III

DEFENDANTS ARE ENTITLED TO DOUBLE COSTS AND ATTORNEY FEES FOR RESPONDING TO THIS APPEAL.

Rule 33(a) of the Utah Rules of Appellate Procedure mandates an award of damages, which may include double costs, if an appeal

is frivolous. Subdivision (b) of that rule defines a frivolous appeal as one that "is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law." Defendants respectfully assert that this appeal is frivolous and that an award of attorney fees and double costs, assessed against appellants' attorney, is appropriate.

Double costs and attorney fees have been awarded against an appealing party where the attorney should have discovered, after careful consideration, that the appeal lacked merit. Backstrom Family Limited Partnership v. Hall, 751 P.2d 1157, 1160 (Utah Ct. App. 1988). This Court could reasonably determine that plaintiffs' counsel should have discovered the cases cited in Point I of this memorandum and thereby learned that this case was without merit. The Court does not, however, need to rely on a "should have known" analysis. Plaintiffs had actual notice. On June 16, 1995, defendants' counsel submitted a letter to the trial court, a copy of which was mailed to plaintiffs' attorney, calling the court's attention to the Draper case. (Copy of letter attached.) A copy of the case was attached to the letter, and the relevant holding was quoted in the letter. In addition, both Draper and Nield were discussed in detail in defendants' summary disposition memoranda filed previously in this appeal. Notwithstanding this actual notice that existing Utah law barred plaintiffs' action, plaintiffs

have never attempted to distinguish the Draper or Nield cases or to argue that they should be modified or reversed.

Where, as here, the judgment for attorney fees below was based on a determination that the action was without merit, the appellate court should also award attorney fees on appeal. Utah Department of Social Services v. Adams, 806 P.2d 1193, 1197-98 (Utah Ct. App. 1991). Such an award of attorney fees and double costs can be made even where there is no showing of bad faith. O'Brien v. Rush, 744 P.2d 306, 310 (Utah Ct. App. 1987).

If an award of attorney fees and double costs is required where a litigant simply should have known that the action was without merit, the award is compelled in this case where plaintiffs' attorney had actual knowledge of two controlling cases which defeated any right of action. Plaintiffs were required, but failed, to acknowledge the existence of those case in arguing for summary disposition, because they had not yet been disclosed to this Court by opposing counsel. Utah Rules of Professional Conduct 3.3(a)(3). Defendants are entitled to an award of attorney fees and double costs incurred in responding to this appeal.

CONCLUSION

The issued raised by appellants have been previously decided. Utah does not recognize any cause of action for wrongful refusal to disclaim an interest in property. Defendants promptly disclaimed any interest in the subject property after plaintiffs' lawsuit was filed. Plaintiffs therefore may not recover attorney fees.

Plaintiffs' claim for attorney fees had no merit, and plaintiffs persisted in pursuing the claim in bad faith. This appeal is likewise pursued in bad faith. The judgment of the trial court should be affirmed, and defendants should be awarded double costs and attorney fees.

DATED this 7th day of August, 1996.

LESLIE W. SLAUGH, for:
HOWARD, LEWIS & PETERSEN
Attorneys for Appellant

MAILING CERTIFICATE

I hereby certify that two true and correct copies of the foregoing were mailed to the following, postage prepaid, this 7th day of August, 1996.

Gordon Duval
Jeff Buhman
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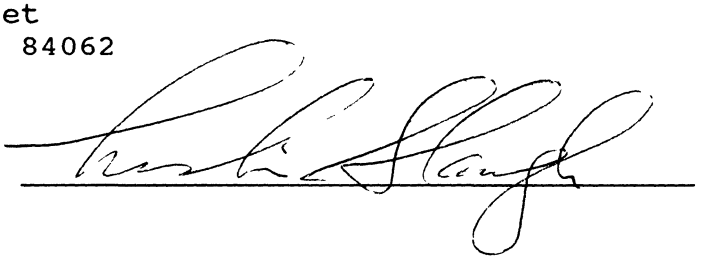

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June 16, 1995

Hon. Guy R. Burningham
Fourth District Judge
125 North 100 West
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Re: CURTIS CHIPMAN and FAY CHIPMAN v. JANICE MILLER et al.
Case No. 950400145

Dear Judge Burningham:

Attached is the case of Draper v. J. B. & R. B. Walker, Inc., 204 P.2d 826 (Utah 1949) which came to my attention after our Memorandum in Opposition to Plaintiff's Cross Motion For Attorney Fees and the Plaintiff's Reply Brief had already been submitted. In relevant part, Draper, 204 P.2d at 829, states:

> If, however, there is no duty to affirmatively act, but only to disclaim in event of suit, then no recovery may be had regardless of the unreasonableness of the refusal. At the common law, no action for damages would lie because of a refusal to release a mortgage or discharge a lien or claim against property.

(citations omitted). We are not aware of any statute which would modify the common law rule.

Thank you for your consideration in this matter.

Respectfully,

HOWARD, LEWIS & PETERSEN

Craig M. Snyder

Enclosure
cc: Gordon Duval, Esq.